

United States Department of Labor
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C. 20001

Date: July 9, 1997

Case No.: 95-INA-472

In the Matter of:

JOANNE THOMPSON,
Employer,

on behalf of

ALDO VIEIRA PAVAO,
Alien

Appearance: M. C. Liu, Esq., New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that Joanne Thompson (Employer), filed on behalf of Aldo Pavao (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On January 29, 1993, the Employer, Joanne Thompson, filed for labor certification on behalf of the Alien, Aldo Vieira Pavao, to fill the position of "cook (live-in)." AF 20.² The job requirements were two years of experience and the willingness to stay overtime and provide references. The job duties included the following:

Plan and prepare menus and cook meals according to recipes and taste of employer; plan and purchase material needed for cooking; keep kitchen area and utensils clean; serve meals and assist[sic] light housekeeping.

Notice of Findings. On October 21, 1994, the CO issued a Notice of Findings (NOF) in which she advised that certification would be denied, subject to Employer's rebuttal, on grounds that (1) it was neither customary nor was it a part of the position description in the Dictionary of Occupational Titles (DOT), for a cook to assist in light housekeeping; (2) the job offer did not appear to meet the definition of full time employment in the context of the Employer's household; and (3) the live-in requirement must be justified as a business necessity. AF 60.

Employer was also advised she could amend the job duties to meet the objections stated by the CO. With respect to the combination of duties, if the job was not amended, Employer was directed to document the fact that the combination of duties was a business necessity. Employer was also directed to document her contention that the position was full time by providing proof of (1) the number of meals prepared daily and weekly, as well as the length of time needed to prepare the meals, and a representative one week schedule; (2) if frequent entertaining was alleged,

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. In this case see: DOT No. **305.281-010 Cook (Domestic ser.)** Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

proof of the entertainment schedule for the twelve months prior to the filing of the application; (3) proof of any other duties the cook will be required to perform; (4) proof that the Employer has employed a full time cook in the past; (5) the identity of the person who will perform the general housework, and of the person who performed the cooking prior to October 1992; and (6) any other information that clearly establishes that this is a full time job offer that the Employer customarily has required.

Rebuttal. The Employer's rebuttal of December 21, 1994, explained that the job description's mention of "light housekeeping" meant that the duties of the position included cleaning the kitchen, as needed. AF 67. The Employer said that her household consists of a family of five. Because she and her husband spend long hours working and took frequent business trips, she was unable to take care of the basic needs related to preparation of meals for her family. The duties of this position require the worker to cook three full meals and to prepare about two snacks per day. She added that, although "we do not primarily require the services of a live-in cook, due to the frequency of our entertaining, we are required to entertain for business and personal reasons."

Employer's justification for the live-in requirement was the need to accommodate her own household and business schedule and to have a cook "available at short notice wherever required," as well as her "need to have the meals cooked for our household." Employer said that on a "typical evening of entertainment" her guests arrive would arrive at 7:30 p.m. and stay for several hours. For this reason, she explained in her rebuttal, it would not be feasible for the position to be live-out.

Final Determination. The CO found the rebuttal unpersuasive in the Final Determination (FD), which was issued on January 5, 1995. AF 70. The CO said that the Employer had failed to provide documentation or any other evidence to prove that she had previously employed a full time cook or to prove the schedule of home entertainment mentioned in the rebuttal. The CO also said that the Employer failed to provide evidence in support of her argument that the live-in requirement was a business necessity, or that the position was full time employment. This conclusion was supported by the fact that the Employer's rebuttal argument that the cook would prepare lunches for her children was contradicted by the circumstance that the children were in school during lunch hours. Based on these findings, certification was denied.

Appeal. After the Employer moved for reconsideration and review on February 9, 1995, the CO denied the reconsideration on the ground that it failed to raise any issues which could not have been addressed in the rebuttal. Harry Tancredi, 88 INA 441

(Dec. 1, 1988)(en banc). The Appellate File (AF) was then referred for to the Board. AF 80.

DISCUSSION

The proper role of the Board in this case is to review the record to ensure that the parties have been afforded due process, to note errors of law, and to determine whether substantial evidence in the record as a whole supports the factual findings of the CO.

A basic premise of the Act and regulations is the provision of 20 CFR § 656.21(b)(2) for proof by the employer that the job qualifications for the position described in the application are not unduly restrictive. An employer cannot impose conditions that are not normal for the occupation or that are not included in the DOT unless the Employer demonstrates a business necessity for the requirement. This proof automatically places on the Employer the burden of proof to establish business necessity where the requirement involves (1) a combination of duties or (2) requires the worker to live on the premises. The reason is that unduly restrictive requirements have a chilling effect on the number of U. S. workers who may apply or qualify for the job opportunity. **Venture International Associates, Ltd**, 87 INA 569 (Jan. 13, 1989)(en banc).

Employer's disingenuous argument that the job description requiring the cook to clean only the kitchen area and utensils, as well as assisting in light housekeeping, means only cleaning the kitchen area is not persuasive, and it is contrary to plain English when considered in the context of the application. Moreover, the Employer declined to amend the job description to delete this requirement of light housekeeping in spite of the CO's explanation in the NOF. As the Employer's job description listed duties which do not appear for a "cook" in the DOT she had the burden of proof to establish that the combination of duties is customarily required for the occupation, or that there is a business necessity for the combination. **Robert L. Lippert Theatres**, 88 INA 433 (May 30, 1990) (en banc). **Van Boerum & Frank Associates, Inc.**, 88 INA 156 (Dec. 5, 1989). The Employer did not include such proof in her rebuttal. Similarly, to establish its business necessity the live-in requirement must be essential to the worker's performance in a reasonable manner of the job duties that the employer requires. **Marion Graham**, 88 INA 102 (Mar. 14, 1990)(en banc). Notwithstanding the directions in the NOF, however, this Employer did not include proof of either the nature or the extent of the household entertainment she claimed or of the business necessity of the live-in requirement set out in her application.

Summary. The Employer's assertion in the rebuttal that it

would not be feasible for a live-out cook to adjust to the Employer's activity schedule and to be available at short notice when required is not sufficient proof to justify her live-in requirement as a business necessity. Employer's proof has been sufficient to show that the job requirements she placed at issue are her preferences. Her proof did not establish that the job requirements she stated in her application are essential to the performance of the duties of this position. **Mary Stafford**, 88 INA 155(Mar. 12, 1990).

As we find that certification was properly denied by the Certifying Officer and that it is unnecessary to address any remaining issues, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may

order briefs.

BALCA VOTE SHEET

Case No.: 95-INA-472

JOANNE THOMPSON, Employer,
ALDO VIEIRA PAVAO, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
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Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: June 30, 1997